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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9 JASON ROMERO,

10 Plaintiff,

11 v.

12 STATE OF WASHINGTON, *et al.*,

Defendants.

Case No. C20-1027-RSM-MLP

ORDER STRIKING PLAINTIFF'S  
MOTION TO COMPEL DISCOVERY  
AND DENYING REQUEST FOR  
ATTORNEY'S FEES

13 This is a civil action in which Plaintiff alleges violations of the Eighth Amendment and  
14 state law arising out of the denial of, and delays in, medical treatment for an eye disease that  
15 resulted in him losing sight in his left eye. (*See* dkt. # 1-2.) Currently before the Court for  
16 consideration is Plaintiff's motion to compel discovery and for attorney's fees. (Dkt. # 29.)  
17 Plaintiff, by way of the instant motion, seeks to compel Defendants to designate and produce a  
18 deponent in accordance with Fed. R. Civ. P. 30(b)(6). (*Id.* at 4-5.) Plaintiff also argues in his  
19 motion that he is entitled to reasonable expenses incurred in bringing this motion, and he seeks  
20 attorney's fees in the amount of \$2,500 for failure of Defendants to engage in good faith  
21 discovery. (*Id.* at 5-6.)

22 Defendants argue in response to Plaintiff's motion that the motion is now moot because a  
23 majority of the deposition in question was conducted on October 14, 2021, and the remainder

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REQUEST FOR ATTORNEY'S FEES - 1

1 was scheduled for November 2, 2021. (Dkt. # 30 at 4.) Defendants further argue that fees should  
2 not be assessed because the delay in producing the deponent was not willful. (*Id.* at 5.) Plaintiff,  
3 in his reply brief, does not dispute that Defendants have now designated and produced the  
4 deponent which was the subject of his motion to compel. (*See* dkt. # 32.) He argues, however,  
5 that he remains entitled to attorney's fees because he had been requesting confirmation of a Rule  
6 30(b)(6) deposition for over two months and did not receive an adequate response from  
7 Defendants until the motion to compel was filed. (*Id.* at 2.)

8 Plaintiff is unclear in his motion papers about the provision under which he seeks  
9 expenses for the filing of his motion. Plaintiff cites to Fed. R. Civ. P. 37(d)(3) which, as pertinent  
10 here, permits the imposition of sanctions where a Rule 30(b)(6) deponent, after being served with  
11 proper notice, fails to appear for the deposition. (Dkt. # 29 at 5.) Plaintiff also references the  
12 State of Washington's discovery rules and appears to excerpt a portion of Rule 37(a)(4) of the  
13 Washington Superior Court Civil Rules. (*Id.*) This state court rule is similar, though not identical,  
14 to Rule 37(a)(5) of the Federal Rules of Civil Procedure, which pertains to the payment of  
15 expenses in relation to the filing of a motion to compel. Because this case is proceeding in  
16 federal court, the Court necessarily relies on the federal discovery rules and not the state  
17 discovery rules. The Court deems Fed. R. Civ. P. 37(a)(5) to be the applicable rule in the  
18 circumstances presented here.

19 Rule 37(a)(5)(A) provides as follows:

20 *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If  
21 the motion is granted--or if the disclosure or requested discovery is provided after  
22 the motion was filed--the court must, after giving an opportunity to be heard,  
23 require the party or deponent whose conduct necessitated the motion, the party or  
attorney advising that conduct, or both to pay the movant's reasonable expenses  
incurred in making the motion, including attorney's fees. But the court must not  
order this payment if:

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REQUEST FOR ATTORNEY'S FEES - 2

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

This Court is not persuaded, based on the materials submitted by Plaintiff in support of his motion to compel, that Plaintiff made a good faith attempt to confer with Defendants before filing his motion. Per this Court's Chambers Procedures:

For all cases, except applications for temporary restraining orders, counsel contemplating the filing of any motion shall first contact opposing counsel to discuss thoroughly, preferably in person, the substance of the contemplated motion and any potential resolution. The Court construes this requirement strictly. Half-hearted attempts at compliance with this rule will not satisfy counsel's obligation. The parties must attempt to reach an accord that would eliminate the need for the motion. All motions must include a declaration by counsel briefly describing the parties' discussion and attempt to eliminate the need for the motion and the date of such discussion. Filings not in compliance with this rule may be stricken.

Pursuant to Local Civil Rule 1(c)(6), "meet and confer" means a good faith conference in person, or by telephone, to attempt to resolve the matter in dispute without the court's involvement. "The Court and Federal and Local Rules have this requirement to minimize waste of judicial time and resources on issues that could be resolved amongst the parties." *Elec. Mirror, LLC v. Avalon Glass & Mirror Co.*, 2018 WL 3862250, at \*1 (W.D. Wash. Aug. 14, 2018).

There is no question that, prior to filing the motion to compel, Plaintiff's counsel had been attempting for almost two months to schedule the Rule 30(b)(6) deposition. During that time, multiple e-mails were exchanged between Plaintiff's counsel's office and Defendants' counsel's office related to this scheduling. (See Parker Decl. (Dkt. # 29-1) at ¶¶ 2, 5-7, 9-12, Exs.

1 A-H; Wong Decl. (Dkt. # 29-10) at ¶¶ 2-4, 6-10.) The last e-mail relating to this topic was sent  
2 by Plaintiff's legal assistant to Defendants' counsel on October 1, 2021. (Parker Decl. at ¶ 12,  
3 Ex. H; Wong Decl. at ¶ 10.) Defendants' counsel acknowledges that she received the October 1,  
4 2021 e-mail, but states that she appears to have missed it when it came in and did not actually see  
5 it until she received the motion to compel. (Locker Decl. (Dkt. # 31) at ¶ 3.)

6 On October 7, 2021, Plaintiff's counsel filed the motion to compel, having made no  
7 further attempt to call Defendants' counsel or arrange an in-person conference to specifically  
8 discuss the substance of the contemplated motion and any potential resolution. According to  
9 Defendants' counsel, she was actually on the telephone with the Rule 30(b)(6) deponent  
10 discussing scheduling when she received an electronic copy of Plaintiff's motion to compel.  
11 (Locker Decl. at ¶ 15.) Defendants' counsel also represents to the Court that she did not speak to  
12 Plaintiff's counsel about the delay in producing the Rule 30(b)(6) witness, aside from a short  
13 conversation that occurred on September 17, 2021, at which time Defendants' counsel advised  
14 Plaintiff's counsel that she expected the Department of Corrections would soon provide her with  
15 firm dates for the deposition. (*Id.* at ¶ 18.)

16 Despite the numerous e-mail exchanges between counsels' offices regarding the  
17 scheduling of the Rule 30(b)(6) deposition, it appears clear from the record that no formal "meet  
18 and confer" took place regarding the delay in scheduling the Rule 30(b)(6) deponent prior to  
19 Plaintiff filing his motion to compel. Had Plaintiff's counsel made such an effort, it appears  
20 likely that the issue could have been resolved without the filing of the motion.

21 Accordingly, Plaintiff's motion to compel (dkt. # 29) is STRICKEN and his request for  
22 an award of fees is DENIED. The Clerk is directed to send copies of this Order to all counsel of  
23 record and to the Honorable Ricardo S. Martinez.

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COMPEL DISCOVERY AND DENYING  
REQUEST FOR ATTORNEY'S FEES - 4

1 DATED this 19th day of November, 2021.

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4 MICHELLE L. PETERSON  
5 United States Magistrate Judge  
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